No. .....

Supreme Court of the United States

OCTOBER TERM, 1941

OPAL SAXTON DAVIS, *Petitioner,*

vs.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, *Respondent.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Petitioner (Appellant below),
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DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON,
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I.

OPINION OF COURT BELOW

The opinion of the Supreme Court of the State of Washington (R. 13-16) was filed January 30, 1942, and is reported in Volume 112 of Washington Decisions (Advance Sheets) pp. 163-167, and in Volume 121 P. (2d) 365-367. It is not yet officially reported.

II.

JURISDICTION

1. The date of the judgment sought to be reviewed is February 16, 1942 (R. 16).

2. The statutory provision believed to sustain the jurisdiction of this court is Judicial Code §237(b), as amended, Title 28 U.S.C.A. §344(b).

3. The grounds on which the jurisdiction of this

court is involved and the cases believed to sustain the jurisdiction of this court are set forth under the heading "Jurisdictional Statement" in the preceding petition, pages 7-9, to which reference is made for the sake of brevity.

III.

STATEMENT OF THE CASE

For the sake of brevity, we refer to the preceding petition, pages 1 to 6.

IV.

SPECIFICATION OF ERROR

The Supreme Court of the State of Washington erred in holding that the general admiralty law rendered inapplicable the Washington workmen's compensation act to the accident herein involved, wherein an employe, working on a barge on navigable waters accidentally fell overboard and was drowned while assisting in dismantling a bridge at Everett, Washington, as more specifically described in the preceding petition.

V.

ARGUMENT

The error assigned raises the single legal question of whether the work in which petitioner's husband was engaged at the time he accidentally drowned was maritime in its nature and governed exclusively by admiralty law, or whether, on the contrary, said work was so far local in character, having only an incidental relation to navigation and commerce, as to permit the application of the state workmen's compensation act

without material prejudice to or interference with the uniformity of maritime law.

Petitioner at all times has contended that, although her husband lost his life while engaged in work on navigable water, nevertheless her rights were to be determined under the state workmen's compensation act, for the reason that the enterprise upon which decedent was at the time engaged was a purely local matter and not concerned with commerce and navigtion.

Just what was the enterprise in which petitioner's husband was engaged at the time he was drowned? The Manson Construction & Engineering Company's contract with the State Highway Department required it to "dismantle the old drawbridge and remove its drawrest and piers" (Finding II, R. 6) and to stock-pile the steel removed from the old drawbridge at a place designated as the steel storage site, on the north bank of the Snohomish River, about 250 feet to the north of the drawrest, or center pier of the drawbridge, which said storage site had been leased by the Washington State Highway Department for that purpose" (Finding IV, R. 7).

In dismantling the drawbridge and stock-piling the steel removed therefrom, the Manson Company utilized its own derrick barge and also a barge which it rented from another concern, which last-mentioned barge was fastened alongside of the derrick barge and was used as a temporary storage space for the dismantled steel until the steel was stock-piled on the adjacent shore (Finding VII, R. 8).

The decedent was hired by the Manson Company

as a structural iron worker, along with other structural iron workers, to dismantle the drawbridge. On the date of his death decedent's duties "were to work on the barge on which the steel was being lowered, to watch the shape of the steel being lowered to the barge, to decide where it should be placed, and to burn off with oxy-acetylene torches any short stubs of iron hanging to it that would interfere with its being properly piled" (Finding VIII, R. 9).

The decedent "drowned before the barge had been completely loaded for the first time, so that none of the steel had been unloaded on shore" (Finding X, R. 9).

Petitioner contends that the enterprise in which the decedent was engaged at the time he was drowned was the performance of his employer's contract to dismantle the drawbridge, which was a purely local matter, regulation of which by the state would work no material prejudice to the general maritime law, and was not concerned with commerce or navigation, and therefore the state law could validly provide compensation.

It must be considered as indisputably established ever since *The Rock Island Bridge*, 6 Wall. 213, that a contract to build or dismantle a bridge is a non-maritime contract, and therefore a local matter.

This court, which is the final arbiter upon what is or is not work of a local nature, has held certain enterprises to be of "merely local concern" to which the respective state compensation acts applied.

In *Millers' Indemnity Underwriters v. Braud*, 270

U. S. 59, a diver working off a floating barge had submerged himself in navigable waters "for the purpose of sawing off the timbers of an abandoned set of ways once used for launching ships which had become an obstruction to navigation" (p. 63). In that case the locality was maritime, the diver's employment in working beneath the surface of navigable waters was maritime, a maritime tort was committed; nevertheless it was held that the nature of the enterprise in which he was engaged was a matter of mere local concern because he was engaged in dismantling a fixed local structure, which, incidentally, had a closer relation to navigation and maritime commerce than has a bridge which is being dismantled. This case, we think, is in principle entirely indistinguishable from the case at bar.

In *State Industrial Board of New York v. The Terry & Tench Co., Inc.*, 273 U. S. 639, reversing *Lahti v. The Terry & Tench Co., Inc.*, 240 N. Y. 292, 148 N. E. 527, "claimant, employed in the construction of a pier, was injured while standing on a floating raft in navigable waters" (148 N. E. 527). This court, reversing the opinion of Cardozo, J., then still a judge of the New York Court of Appeals, did so in a *per curiam* opinion, merely stating "reversed upon the authority of *Millers' Indemnity Underwriters v. Braud*, 270 U. S. 59." Here again the tort was a maritime tort, but inasmuch as the enterprise in which claimant was engaged at the time of his injury on the floating raft was the building of a fixed structure, this court held that the matter was one of local

concern to which the state compensation law applied. We must assume, because this court relies on *Millers' Indemnity Underwriters v. Braud*, 270 U. S. 59, that if the claimant had been injured on the floating raft while dismantling a pier—a fixed local structure—instead of building it, the result would have been the same. And so here, where the project on which deceased was engaged on the barge was the dismantling of a bridge, the matter must be held to be a matter of local concern only, governed by the state law. The *Terry & Tench* case, again, cannot be distinguished in principle from the case at bar.

There was discussed in the *Braud* case, *supra*, 270 U. S. 59, 63, the previous case of *Grant Smith-Porter Co. v. Rohde*, 257 U. S. 469, in which it had been held that a carpenter injured while at work upon an uncompleted vessel lying in navigable waters within the State of Oregon was engaged in a non-maritime contract having no direct relation to navigation or commerce and therefore the exclusive remedy prescribed by the Oregon workmen's compensation act precluded him from recovering damages for his injuries except under said act.

In *Sultan Railway & Timber Co. v. Department of Labor & Industries*, 277 U. S. 135 (affirming 141 Wash. 172), there was involved the validity of an order requiring payments into the state workmen's compensation fund of assessments based on the wages of certain employees engaged in log-booming work on the Snohomish River, being the same river on which

the accident occurred in the instant case. It was there stated:

> "The plaintiff in one suit is conducting logging operations, a part of which consists in putting sawlogs into booms, after they have been thrown into a navigable river, so that they conveniently may be towed elsewhere for sale. The men are employed in the booming work. The plaintiff in the other suit conducts a saw mill on the bank of a navigable river. Logs are towed in booms to a point adjacent to the mill and then anchored. The booms afterwards are taken apart and the logs are guided to a conveyor extending into the river and then drawn into the mill for sawing. The men are employed in taking apart the booms and guiding the logs to the conveyor. In both instances the place of work is on navigable water—in one it is done before actual transportation begins and in the other after the transportation is completed.
>
> "It is settled by our decisions that where the employment, although maritime in character, pertains to local matters, having only an incidental relation to navigation and commerce, the rights, obligations and liabilities of the parties, as between themselves, may be regulated by local rules which do not work material prejudice to the characteristic features of the general maritime law or interfere with its uniformity. *Grant Smith-Porter Co. v. Rohde*, 257 U. S. 469; *Millers' Indemnity Underwriters v. Braud*, 270 U. S. 59; *Alaska Packers Association v. Industrial Accident Commission*, 276 U. S. 467."

In the recent decision, *Parker v. Motor Boat Sales, Inc.*, 314 U. S. ....., 62 S. Ct. 221, delivered December

8, 1941, rehearing denied January 5, 1942, 62 S. Ct. 477, there was involved the meaning of the proviso in Section 3(a) of the Longshoremen's & Harborworkers' Act, 44 Stat. 1424, 33 U.S.C.A. §903(a), which makes compensation payable "only if * * * recovery for the disability or death through workmen's compensation may not be validly provided by State law." We call particular attention to the following portion of the opinion found at 62 S. Ct. on page 225:

> "We believe that there is only one interpretation of the proviso in Section 3(a) which would accord with the aim of Congress; the field in which a state may not validly provide for compensation must be taken, for the purposes of the Act, as the same field which the *Jensen* line of decision excluded from state compensation laws."

As there was no dissenting opinion filed, and petition for rehearing was denied (314 U. S. ....., 62 S. Ct. 477), it must be considered that said opinion now definitely decides that the Federal Longshoremen's Act applies only in those fields which the *Jensen* line of decision excluded from state compensation laws, and conversely where the "fields" pertain to matters of "mere local concern" recognized in cases like *Millers' Indemnity Underwriters v. Braud*, 270 U. S. 59; *State Industrial Board of N. Y. v. Terry & Tench Co., Inc.*, 273 U. S. 639; and *Sultan Railway & Timber Co. v. Department*, 277 U. S. 135 (cited and discussed above) Congress did not intend the Federal Act to apply, but intended the state compensation laws to continue to apply.

In other words, since the Washington workmen's compensation act applies to all extrahazardous employ-

ments "which are within the legislative jurisdiction of the state" (Rem. Rev. Stat. §7674), said state law includes the entire field not excluded from state jurisdiction by the "Jensen line of decision." Consequently the sole test in the instant case is where the facts fall under the "Jensen line of decision."

The "Jensen line of decision" lays down the line of demarcation between exclusive federal maritime jurisdiction and state jurisdiction, definitely leaving within the field of state legislative jurisdiction all maritime matters of "merely local concern" which do not interfere with the "proper harmony and uniformity of the general maritime law." As pointed out in the cases discussed above, an employee engaged in the enterprise of dismantling a bridge or other local structure, such as a submerged set of ways or a pier, is, even though in the water or upon a barge on the water, engaged in a purely local enterprise, a "merely local matter," to which the state law applies.

In the *Parker* case the employee was engaged in testing a motor boat, and thus clearly engaged in a maritime occupation directly connected with navigation and commerce; and hence, it was rightly held (62 S. Ct. 224) that "under the holding of that case [*Jensen* case] * * * federal jurisdiction is exclusive and state action forbidden in an area, which doubtless embraces the case before us." It was properly ruled, therefore, that the case fell within the exclusive federal domain. In the instant case, however, the facts, under the "Jensen line of decision," clearly relate to a matter of local concern only and are plainly within the field of state jurisdiction.

The Longshoremen's Act was passed in March, 1927. *Millers' Indemnity Underwriters v. Braud*, 270 U. S. 59 (1926) and *State Industrial Board v. Terry & Tench Co., Inc.*, 273 U. S. 659 (1926), upon which we rely, were a part of the "Jensen line of decision" when the Longshoremen's Act was passed, and as this court stated in the *Parker* case, Congress "expressly kept out of the area in which 'recovery * * * may be validly provided by state law'" (62 S. Ct. 224).

See, also: *Crowell v. Benson*, 285 U. S. 22, at page 39, and note 3 thereon.

In the instant case the Manson Company's operations, in accordance with its contract, were the demolishing of the drawbridge and placing the steel therefrom in a stock-pile on shore. The placing of the dismantled steel on a barge as a temporary storage space until deposited on shore, which required the barge to be moved about 200 feet over navigable waters of the Snohomish River, was not the engaging in commerce in any sense at all so as to affect "the proper harmony or uniformity of the general maritime law in its international and interstate relations."

In the dismantling operations, it was necessary to rent a barge as a temporary storage space for the dismantled steel. While the dismantled steel on the barge was being unloaded at the stock-pile on shore, the dismantling operations must of necessity have temporarily ceased because the derrick barge was moved to shore with the rented barge and the derrick used to unload the steel on shore (Finding VII, R. 8).

It is thus apparent that the use of the rented barge

for a temporary storage site was just as much a part of the dismantling operations as was the use of the derrick to lower the dismantled steel onto the barge.

The fact that the barge was rented on July 2, 1940 (Finding VI, R. 7), and the accident occurred on July 8, at which time the barge had not yet been fully loaded for the first time (Finding VII, R. 8), and that decedent had been working on the job for the fifth day at the time he was drowned, would indicate that the depositing of the steel on the barge was purely incidental to the dismantling operations and that the Manson Company's enterprise was not the loading of a vessel which was to engage in commerce on the navigable waters or the high seas.

If decedent's employment at the time of his drowning could be said to be maritime in character because working aboard the barge, nevertheless, it was purely incidental to the enterprise in which his employer was engaged, namely, that of dismantling the drawbridge, which was purely of a local character, not connected with navigation or commerce.

Suppose petitioner herein had filed her claim for pension under the Longshoremen's & Harborworkers' Act, 44 Stat. 1424, 33 U.S.C.A. §§901 *et seq.* Under the facts involved herein, the Deputy Commissioner for the 14th Compensation District, in which Washington is situated, would have first had to determine whether the Longshoremen's Act could apply. In view of the proviso to section 3(a) of said act, 33 U.S.C.A. §903(a), and the foregoing cases, as well as the following cases decided by the Circuit Court of Appeals for the Ninth Circuit: *Ketchikan Lumber & Shingle*

Co. v. Bishop, 24 F. (2d) 63; *Sunny Point Packing Co. v. Faigh*, 63 F. (2d) 921, and *Alaska Packers Association v. Marshall*, 95 F. (2d) 279, it is apparent that he would have held that the Longshoremen's Act could not apply because recovery could validly be provided by the Washington workmen's compensation act.

The case of *Comar v. Department of Labor & Industries*, 187 Wash. 99, relied on by the Department and by the courts below as decisive of this case, is not in point as the facts are entirely different. In that case the rock had been transported for hire by barge some 70 or 80 miles over the navigable waters of Puget Sound. Before the rock could be used it had to be unloaded from the barge. Comar was injured while assisting in unloading the rock from the barge, he being on the barge at the time. It was necessary that the barge be unloaded before it could again be released for further transportation service.

The barge there was actively engaged in commercial transportation for hire over navigable waters of Puget Sound to Hood Canal, and since the unloading of it had a direct relation to navigation and commerce it was therefore within the exclusive admiralty jurisdiction, and therefore held that the state workmen's compensation act could not validly apply to the injured workman.

In the instant case the rented barge on which the steel was temporarily stored was not engaged in commercial transportation, but, on the contrary, it was withdrawn from commerce and navigation while the drawbridge was being dismantled.

In the instant case, there was no tort involved, the dismantling of the drawbridge was a non-maritime enterprise, and the barge was being used only as a temporary storage space in connection with such dismantling operations, therefore the application of the Washington workmen's compensation act to this accident would not work "material prejudice to the characteristic features of the general maritime law or interfere with its uniformity." *Sultan Railway & Timber Co. v. Department of Labor & Industries*, 277 U. S. 135.

We earnestly pray that this petition for a writ of certiorari be granted.

Respectfully submitted,

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